

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID G. TAYLOR,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

Case No. C06-5257 FDB

ORDER ADOPTING REPORT
AND RECOMMENDATION
DISMISSING HABEAS CORPUS
PETITION WITH PREJUDICE

This matter comes before the Court on the Report and Recommendation of the Magistrate Judge that Petitioner's request for habeas corpus relief be denied and the petition be dismissed with prejudice. The Petitioner has filed objections to the Report and Recommendation.

Petitioner's habeas corpus petition challenges his 2003 Pierce County conviction and plea agreement for two counts of assault in the second degree. As detailed by the Magistrate Judge, the second and third grounds raised in the petition, dealing with Fifth Amendment Double Jeopardy claims and ineffective assistance of counsel are exhausted, but procedurally barred. Additionally, Petitioner's *Apprendi* argument is without merit. Petitioner plead guilty to a lesser sentence of two counts of second degree assault when facing one count of first degree assault. There is no Double Jeopardy violation and thus, no *Apprendi* violation.


Petitioner has filed objections to the Report and Recommendation asserting the procedurally

1 barred claims should be considered on the merits because he can demonstrate cause and prejudice for
2 his procedural default or alternatively can demonstrate actual innocence. These arguments lack
3 merit. The objection concerning the *Apprendi* claim also is without merit because at the time of his
4 plea agreement, *Apprendi* did not apply to sentences that merely exceeded the standard range and the
5 change in law resulting from *Blakely* is not applied retroactively. The argument that Petitioner
6 deserves an evidentiary hearing is unpersuasive.

7 The Court having reviewed the Report and Recommendation of the Hon. J. Kelley Arnold
8 United States Magistrate Judge, objections to the Report and Recommendation, and the remaining
9 record, does hereby find and Order:

- 10 (1) The Court adopts the Report and Recommendation;
- 11 (2) The petition is **DISMISSED**. The first two grounds for relief are procedurally barred
12 and the third is without merit.
- 13 (3) The Clerk is directed to send copies of this Order to Petitioner, counsel for
14 Respondent, and to the Hon. J. Kelley Arnold.

15 DATED this 2nd day of March, 2007.

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20 FRANKLIN D. BURGESS
21 UNITED STATES DISTRICT JUDGE
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